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IMPLICATION OF LIFE ESTATES, DISTRIBUTIVE CONSTRUCTION AND DISPOSITION OF INTERMEDIATE INCOME.

§ 1. THE PROBLEMS STATED. Suppose a testator makes a devise or bequest to take effect after the death of A, without however expressly giving any interest to A. Does A take a life estate by implication? If not, what happens to the income or the rents and profits?

Suppose a testator devise Blackacre to A for life and after the death of A said Blackacre together with other property is devised to B. Here three questions at once arise. Does A take a life estate by implication in the property other than Blackacre? If not, then are the words "after the death of A" to be taken distributively so that they will apply only to Blackacre, thus making a devise of the rest of the estate to take effect immediately upon the testator's death in B? If there is no implication of a life estate to A and no distributive construction, then what becomes of the intermediate income of the property other than Blackacre until A's death?

These cases show the way in which the questions to be considered may arise and also the way in which three apparently unconnected subjects may in fact come up for consideration in a given case. Obviously also the difficulties presented in the cases put must in most instances be caused by the failure of the testator's mind to work upon the effect of the language used under the circumstances which will probably be presented. Clearly the circumstances surrounding the making of the instrument can be of no particular benefit in throwing light upon the expressed intent The rules, therefore, established by the cases must be regarded as supplying results independently of any actual intention on the part of the testator. They should, therefore, be adhered to as establishing definite rules of construc-

tion, not to be departed from unless a real special context warrants it.

§ 2. IMPLICATION OF THE LIFE ESTATE WHERE THERE IS A GIFT AFTER THE DEATH OF A. Several distinctions must be taken:

Where the gift after the death of A is to all of the testator's heirs at law if real estate is involved, or to all the next of kin if personalty be involved—no more and no less—and there is no special context affecting the matter, a life estate in A is regularly found.[1] The reason for this was that since the heir was expressly excluded till the death of A, an incongruity or absurdity would arise if before the death of A the heir was let in to enjoy the estate because of an intestacy. The only way to prevent this absurdity or incongruity was to give a life estate to A.

Observe that the entire basis for the regular implication of the life estate in these cases is the incongruity which arises. Any circumstances therefore which eliminate that incongruity necessarily prevent the application of the general rule in favor of the implication of the life estate. For instance, if the gift after the death of A be to one who is not the testator's heir at law, but to a stranger, and there be no further special context, no estate for life in A can be implied.[2] However plausible it may be that A was intended to take a life estate, that inference is mere speculation and conjecture, and insufficient as a basis for implying the life estate in A. Suppose now that a gift be made to all the testator's heirs at law and no others from and after the death of A, and thereafter a residuary clause is added, so that if it be held that there is no gift to A by implication the residurary devisee will be entitled. If the residuary devisee is not the same as the heir or heirs at law it would seem that no gift to A for life could be implied, for again the incongruity has been eliminated.[3] The same is true if property is appointed from and after the death of A, but there is a gift in default of appointment

[1] (a) Cases where real estate was involved and the gift after the death of A was to the testator's heirs at law. 1 Jarman on Wills, (6 ed. Bigelow), *498, 499, and many cases there cited, to which may be added the following: Doughty v. Stillwell, 1 Bradf. (N. Y.) 300, 310; White v. Green, 1 Ired. Eq. (N. C.) 45; Macy v. Sawyer, 66 How. Pr. 381; Kelly v. Stinston, 8 Blackf. (Ind.) 387; Rathbone v. Dyckman, 3 Paige, Ch. 8, 27.

(b) Cases where personalty was involved. 1 Jarman on Wills, (6 ed. Bigelow), * 510, 511; James v. Shannon, Ir. R. 2 Eq. 118. Contra dictum of White v. Green, 1 Ired. Eq. (N. C.) 45.

[2] Aspinall v. Petvin, 1 S. & St. 544, (1824); Barnet v. Barnet, 29 Beav. 239 (1861); Harris v. Du Pasquier, 26 L. T. 689 (1872); Greene v. Flood, 15 L. R. Ir. 450 (1885); Doughty v. Stillwell, 1 Bradf. 300, 310 (1850). But see Willis v. Lucas, 1 P. Wms. 472, of which case Jarman says (1 Jarman, 6 ed. Bigelow, * 499, n. b.): It "seems inconsistent with, and is overcome by the mass of authorities. The point indeed was not definitely disposed of."

[3] Cranley v. Dixon, 23 Beav. 512; Hudleston v. Gouldsbury, 10 Beav. 547.

which will take effect as to the interest prior to A's death.[4] Again, suppose that the gift after the death of A is itself a residue of personalty or a mixed residue of realty and personalty, so that according to the usual rule[5] if A does not take a life estate by implication the intermediate income must accumulate and pass to the one ultimately entitled. Here the fact that the one entitled after the death of A is the testator's heir at law or next of kin—no more and no less—presents no incongruity whatever. Hence there can be no basis for the implication of a life estate according to any general rule.[6]

Suppose now the gift after the death of A is to part only of the heirs at law or next of kin of the testator, or to all the heirs at law or next of kin and to a stranger. In both cases alike there is less incongruity than in the case where the gift after the death of A is to the heirs at law or next of kin—no more and no less. There is much less incongruity in all the heirs at law being let in during the life of A and then part only allowed to take after the death of A, or all allowed to take together with a stranger after the death of A, than there is where the heirs at law are let in until A's death and then the same heirs at law take after A's death. At first there was an inclination to imply the life estate in A readily, even where the gift after the death of A was to part only of the heirs at law or to all the heirs at law and a stranger. This seems to have been the attitude of the English judges in the 18th century.[7] In the first three-quarters of the 19th century we have a period of clearly conflicting opinions. In 1862, KINDERSLEY, V. C., in *Stevens* v. *Hale*,[8] held that where the gift after the death of A was to the testator's heirs and strangers, no life estate would be implied. On the other hand, in 1867, STUART, V. C., in *Humphreys* v. *Humphreys*,[9] held that where the gift was to part only of the next of kin of the testator the life estate would be implied.[10] Finally in 1879 *Ralph* v. *Carrick*[11] seems to have settled the law in England that where the gift is to all the heirs at law or

[4] Henderson v. Constable, 5 Beav. 297.

[5] Post, § 5.

[6] Cf. Ralph v. Carrick, 5 Ch. Div. 984, per Hall, V. C.

[7] Roe d. Bendale v. Summerset, 5 Burr. 2608; Bird v. Hunsdon, 2 Swanst. 342.

[8] 2 Dr. & Sm. 22. See also Romilly, M. R., in Barnet v. Barnet, 29 Beav. 239.

[9] L. R., 4 Eq. 475.

[10] See also Blackwell v. Bull, 1 Keen. 177 (1836) and Cockshott v. Cockshott, 2 Coll. 432 (1846) where, however, the implication of the life estate when the gift was to part of the testator's heirs or next of kin has been justified upon the special context of the wills there involved according to Hall, V. C., in Ralph v. Carrick, 5 Ch. Div. 984, 994. See also Doughty v. Stillwell, 1 Bradf. (N. Y.) 300, 311 (semble); Macy v. Sawyer, 66 How. Pr. (N. Y.) 381; Holton v. White, 23 N. J. L. 330.

[11] 5 Ch. Div. 984, 987 (1877); before Hall, V. C., 11 Ch. Div. 873 (1879); before the Court of Appeal, James, L. J., Brett, L. J. and Cotton, L. J.; Ralph v. Carrick approved in Greene v. Flood, 15 L. R. Ir. 450 (1885).

next of kin of the testator and a stranger after the death of A, no life estate in A will be implied. Thereafter it was held with equal firmness where the gift after the death of A was to less than all the next of kin or heirs at law the life estate would not be implied.[12]

Thus the English judges, from implying the life estate loosely as the result of what they guessed to be a probable intention on the part of the testator, came to regard such implication as rather the result of speculation and conjecture and as leaving the rights of parties too much in the discretion of individual judges. Accordingly they substituted in its place a definite rule designed to supply a recognized gap either in the testator's intention or in his expression of intention, or both. This is clearly a move from a period where the art of construction was imperfectly practiced to one where the art was highly developed and practiced by those having great skill.

Of course there may be cases containing a special context sufficient to support the inference of a life estate in A apart from the application of any rule by which such life estate is regularly implied.[13] So there will be cases where all the elements are present for the regular implication of a life estate but where a special context will negative the implication of any such life estate.[14] This is very apt to be the case where a particular estate is given to A for life and then after the death of A that property together with other property is given to the testator's heirs at law. Here the incongruity of A taking a life estate in the whole when he is expressly given a life estate in part only is matched against the incongruity of the heirs at law, who are expressly excluded until the death of A, taking the estate at once on the testator's death. It may be safely affirmed that in the ordinary case the incongruity of A's taking a life estate in the whole where he is expressly given only a life estate in part is sufficient to prevent the implication of a life estate in A.[15] But that we shall see does not permit the incongruity of the heir at law who was expressly excluded until A's death, taking in the meantime. Both incongruities are avoided as we shall see, by adopting what is known as the distributive construction.[16]

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[12] Woodhouse v. Spurgeon, 52 L. J. Ch. 825 (1883) (gift to five out of six who would take as next of kin of testator); In re Springfield, Chamberlin v. Springfield, [1894] 3 Ch. 603.

[13] Blackwell v. Bull, 1 Keen. 177 (1836); Cockshott v. Cockshott, 2 Coll. 432 (1846) as explained in Ralph v. Carrick, 5 Ch. Div. 987 (1877).

[14] Isaacson v. Van Goor, 42 L. J. Ch. 193; Rathbone v. Dyckman, 3 Paige 8.

[15] Boon v. Cornforth, 2 Ves. Sr., 277; Dyer v. Dyer, 19 Ves. 612; Stevens v. Hale, 2 Dr. & Sm. 22; Sympson v. Hornsby, Finch's Prec. Ch. 439; James v. Shannon, Ir. R. 2 Eq. 118; White v. Green, 1 Ired. Eq. (N. C.) 45; Rathbone v. Dyckman, 3 Paige 8. Cf. however, Bird v. Hunsdon, 2 Swanst. 342; Macy v. Sawyer, 66 How. Pr. (N. Y.) 381.

[16] Post, § 3.

§ 3. THE DISTRIBUTIVE CONSTRUCTION. Suppose a particular estate be devised to A for life and after the death of A the same property together with other property is devised to B. Suppose also that B is the testator's sole heir at law. Here then we have the usual situation where to avoid an incongruity a life estate will be implied in A. But the fact that A is already expressly given a life estate in part tends to indicate that A was to have no further interest in the whole.[17] In short, there is about as much incongruity in A's being let in for a life estate in the whole when he is expressly given a life estate in part only as there is in B's being let in as heir at law at once on the testator's death when he was expressly excluded until the death of A. In the case put both incongruities may be avoided by taking the words "after A's death" in a distributive sense—that is, applying them only to the property in which A takes an express life estate. Thus B will take immediately on the testator's death excepting as to the property given to A for life, and as to that property he will take upon A's death. Whether in the case put a life estate will be implied to A or the distributive construction adopted seems not to be the subject of any rule,[18] and yet it is believed that in order to avoid the two incongruities presented a court would incline at once to the distributive construction.

Observe, however, that the distributive construction is resorted to to avoid two incongruities. Therefore whenever the circumstances are such that these incongruities are not presented this argument for the adoption of the distributive construction loses its force. For instance, when the gift after the death of A is not to the heirs at law of the testator and those alone, there is no incongruity whatever in an intestacy until the death of A. Hence no life estate would be implied in A and the inclination would be against the adoption of the distributive construction, in the absence of a special context supporting it.[19] In the same way, if the gift after the death of A be to the heirs at law of the testator but an intestacy until the death of A may be avoided under well settled rules without adopting the distributive construction or the implication of a life estate in A, the argument from incongruity again fails. Thus, if the gift of the whole property after the death of A is of a mixed residue of realty and personalty, so that under the usual rule hereafter mentioned[20] there will be no intestacy, but the intermediate income in the mixed

[17] Ante, § 2.

[18] Hawkins on Wills, p. 177.

[19] Rex v. Inhabitants of Ringstead, 9 Barn. & Cr. 218; Aspinall v. Petvin, 1 S. & St. 544; Davenport v. Coltman, 12 Sim. 588; Attwater v. Attwater, 18 Beav. 330.

[20] Post, § 5.

fund will accumulate and be added to the principal and pass to B on the death of A, all argument from incongruity in favor of the distributive construction is removed and that construction, if it be adopted, must be founded upon the special context.[21] Where, however, upon a careful analysis of the entire instrument a special context supports the distributive construction it has been adopted where the gift after the death of A was to a stranger or to the heirs at law of the testator and a stranger or to a part only of the heirs at law or next of kin of the testator.[22] Of course, where there are explicit words postponing the gift until after the death of A the distributive construction is defeated.[23] So if there is a distinct separation of the contingencies so that the devise of all the property is expressed to be made "at the testator's death and after the death of A," the distributive construction would naturally be adopted.[24]

§ 4. INTERMEDIATE INCOME—INTRODUCTORY. In the cases considered in the two preceding paragraphs, where a life estate cannot be implied and the distributive construction cannot be adopted, there is left a gift to take effect *in futuro* after the death of A with no apparent disposition in the meantime. What then is to become of the rents and profits or intermediate income prior to the time the gift after the death of A takes effect? The same question, of course, arises in all cases where there is a gift to take effect *in futuro* and apparently no disposition of the property in the meantime.

§ 5. THE RULES ESTABLISHED BY THE CASES. If the subject matter of the devise be specific lands or specific personal property, there is an intestacy or the residuary devisee or legatee is entitled.[25] If, however, a residue of personalty alone be bequeathed, the intermdiate income must accumulate and be added to the principal and pass to the one ultimately entitled.[26] This is based upon the proper meaning

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[21] Lill v. Lill, 23 Beav. 446; Rathbone v. Dyckman, 3 Paige 8.

[22] Cook v. Gerrard, 1 Saund. 181; Hutton v. Simpson, 2 Vern. 722; Doe v. Brazier, 5 B. & A. 64; Rex v. Inhabitants of Ringstead, 9 Barn. & Cr. 218; Lill v. Lill, 23 Beav. 446; Rhodes v. Rhodes, 7 App. Cas. 192; Dyer v. Dyer, 19 Ves. 612; Drew v. Killick, 1 De. G. & S. 266.

[23] See Ralph v. Carrick, 5 Ch. Div. 984; 11 Ch. Div. 873 (as commented on in 1 Jarman on Wills, 6 ed. Bigelow, * 505).

[24] See Rex v. Inhabitants of Ringstead, 9 Barn. & Cr. 218, 227, per Bailey, J. referring to a case from Moore's Reports.

[25] 1 Jarman on Wills, 6 ed., Bigelow, 614; Theobald on Wills, 7 ed., 180, 181; Hopkins v. Hopkins, Cas. Temp. Talb. 44, Hawkins on Wills, App. 1; Haughton v. Harrison, 2 Atk. 329; Doughty v. Stillwell, 1 Bradf. (N. Y.) 300, 310.

[26] Fearne, C. R. 546; 1 Jarman on Wills, 6 ed., Bigelow, * 614; Theobald on Wills, 7 ed., 182; Green v. Ekins, 2 Atk. 473; Hodgson v. Bective, 1 Hem. & M. 376; 10 H. L. C., 656; Marriott v. Turner, 20 Beav. 557; Bullock v. Stones, 2 Ves. Sr. 521 ("all my real and personal estate"); In re Drakeley's Estate, 19 Beav. 395 ("all my real and personal estate"); Studholme v. Hodgson, 3 P. Wms. 300. Note that Hopkins v. Hopkins, Cas. Temp. Talb. 44, so far as it held the contrary has been overruled.

of the word "residue." Thus when a devise or bequest is made to A to take effect *in futuro* and then the residue of real and personal property is given to B, B will be entitled to the intermediate income by reason of the gift of the "residue."[27] Hence when a residue itself of personal property is devised to A *in futuro* the intermediate income must accumulate and ultimately pass to A.[28] On the other hand, if the devise be a residue of realty alone, the English cases hold that there is an intestacy, and the heir at law is entitled to the intermediate rents and profits.[29] Here obviously enough the courts refused to give to the word "residue" the same meaning and effect as was given to it where a residue of personalty was involved.

If, however, the devise be of a mixed residue of real and personal property the intermediate income must, in the absence of a special context requiring a different result,[30] be accumulated and paid over to the one ultimately entitled. This rule has been given a wide application under varying circumstances. It has been applied where an express trust was created and the gift was of the "residue" of real and personal property.[31] It makes no difference, however, that there is no trusteeship but a devise of legal interests only.[32] The use of the word "residue" would seem to be unnecessary so long as some form of expression is used which brings real and personal property

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Hodgson v. Bective, 1 Hem. & M. 376; per Wood, V. C. at 399, and 10 H. L. C., p. 656, per Westbury at p. 666.

[27] Stephens v. Stephens, Cas. Temp. Talb. 228, 233; In re Eddels' Trusts, L. R. 11 Eq. Cas. 559; In re Mowlem, L. R. 18 Eq. 9; Harris v. Lloyd, Turn. & R. 310; In re Tharel's Trusts, 13 L. R. Ir. 337; Windham v. Windham, 3 Bro. C. C. 58; Guthrie v. Walrond, L. R. 22 Ch. Div. 573; Sanford v. Blake, 45 N. J. Eq. 247.

[28] See cases cited, **supra**, note 26 and especially Green v. Ekins, 2 Atk. 473, 475. Also Gibson v. Montfort, 1 Ves. Sr. 485; Rogers v. Ross, 4 Johns. Ch. (N. Y.) 388, 399.

[29] Hopkins v. Hopkins, Cas. Temp. Talb. 44; Hawkins on Wills, App. 1; Hodgson v. Bective, 1 Hem. & M. 376; 10 H. L. C. 656; Wade-Gery v. Handley, 1 Ch. Div. 653; 3 Ch. Div. 374; Wills v. Wills, 1 D. & War. 439; Davenport v. Coltman, 12 Sim. 605; Chambers v. Brailsford, 18 Ves. 368; Re Williams; Spencer v. Brighouse, 54 L. T. 831; Bullock v. Stones, 2 Ves. Sr. 521 ("all my real and personal estate"); Duffield v. Duffield, 1 Dow & Clark, 268.

[30] For instance, in In re Townsend's Estate, Townsend v. Townsend, 34 Ch. Div. 357, the gift of the residue of real and personal property was upon trust to pay the income to W. S. T. for life and then to W. S. T.'s children in equal shares. The gift of the life estate to W. S. T. was void because his wife witnessed the will. The gift to the children of W. S. T. could not be accelerated because there were no children in **esse**. It was held that the income of the real estate would not be accumulated but must go in the meantime to the heirs at law. The preceding life estate expressly given negatived any inference that the children who were to take in futuro were to have the accumulations of income.

[31] Glanvill v. Glanvill, 2 Meriv. 38. In the following cases there was not only a gift of the residue of real and personal property and a trusteeship, but other facts which aided the theory that the gift of the residue in futuro was intended to carry accumulations. Gibson v. Montfort, 1 Ves. Sr. 485; Ackers v. Phipps, 3 Cl. & Fin. 665.

[32] Genery v. Fitzgerald, Jac. 468; Rogers v. Ross, 4 Johns. Ch. (N. Y.) 388.

into a single blended fund of a residuary character.[33] On the other hand, when a testator begins to enumerate property specifically so as to designate both real and personal property, but does not include them together in a single blended fund, it may be that only the income of the personal property will accumulate, while the rents of the real estate will go to the heir at law as intestate property.[34]

The rule applicable to a mixed residue of real and personal property has been justified on the ground that when the testator devises *in futuro* a mixed or blended fund of real and personal property he expresses an intention that the rule in regard to personalty shall operate upon both.[35] But obviously enough this is an arbitrary assumption, for why may not the inference as well be that the testator intends the rule in regard to realty to prevail as to both realty and personalty? The reason for the rule with respect to the mixed residue of realty and personalty must be that, of the two opposing rules regarding a residue of realty and a residue of personalty, the latter is more in accordance with the natural and proper meaning of the language used than the former.

§ 6. CRITICISM OF THE RULE THAT THE INTERMEDIATE RENTS AND PROFITS OF A RESIDUE OF REALTY GO TO THE HEIR AT LAW. Three reasons have been urged for construing the word "residue" differently when applied to personalty alone and when applied to realty alone.

First: It has been said that if the heir did not take so as to be entitled to the rents and profits until the future event happened, the freehold would be in abeyance.[36] This is not strictly true for the fee may descend to the heir at law and his seisin should satisfy, in these times at least, any necessary requirement of the feudal land law. If it be said that you cannot give the heir the legal estate and at the same time deprive him of the rents and profits, the answer is that that is exactly what Lord ELDON did in *Genery* v. *Fitzgerald*,[37]

[33] In re Taylor, Smart v. Taylor, [1901] 2 Ch. 134 ("all real and personal estate, not otherwise disposed of"); Lachlan v. Reynolds, 9 Hare, 796 ("the interest of real and personal property"); Dougherty v. Dougherty, 2 Strob. Eq. (S. C.) 63, ("all my property both real and personal"); In re Dumble, Williams v. Murrell, L. R. 23 Ch. Div. 360, (realty and personalty were devised by different clauses, yet the intermediate income from both realty and personalty was accumulated). Bullock v. Stones, 2 Ves. Sr. 521, so far as it is **contra** seems to be overruled. Ackers v. Phipps, 3, Cl. & Fin. 665, per Lord Brougham, at p. 697.

[34] In re Drakeley's Estate, 19 Beav. 395, (devise of "freehold, copyhold and all his real estate, and bequeathed all his ready money, securities for money, stock and personal estate, etc.").

[35] Genery v. Fitzgerald, Jac. 468, per Lord Eldon; Ackers v. Phipps, 3 Cl. & Fin. 665, per Lord Brougham, at p. 699.

[36] Hodgson v. Bective, 10 H. L. C. 656, per Lord Westbury, at p. 664.

[37] Jac. 468.

where a mixed residue of realty and personalty was involved. Furthermore, Chancellor WALWORTH in *Rogers* v. *Ross*,[38] met the objection directly by declaring that a court of chancery would make the heir at law a constructive trustee[39] of the rents and profits for the one ultimately entitled, or would appoint a receiver to take the rents and profits.

Second: It has been said that the heir cannot be disinherited without express words. Logically this assumes the very point at issue, since the question is, has the testator expressed an intention to give the rents and profits to the devisee who is to take *in futuro?* Practically this second reason expresses merely a prejudice in favor of the heir founded upon the recognition by the English courts of the prevailing English custom of permitting the eldest son to take the ancestor's or settlor's entire landed property.[40] Such a prejudice has no place in American jurisdictions today. It is entirely inconsistent with our manners and customs and practically always has been.

Third: It has been said that prior to the time when after-acquired real estate could be devised, a residuary devise of real estate was looked upon as a specific devise of real estate. Hence the rule applicable to a specific devise of real estate applied and the rents and profits could not be accumulated.[41] The rule having become thus established on this logical ground could not be regarded as repealed by implication when after-acquired real estate was made devisable by the Wills Act.[42] The premise in this reasoning is defective because the material question is not whether the devise was one of specific real estate, but what meaning shall be given to the word "residue" when specific real estate, if you please, was described as a "residue?" Of course, in an American jurisdiction where the question comes up for the first time, long after statutes have made after-acquired real estate devisable, there is the same opportunity for ignoring the rule of the English cases based upon the fact that after-acquired real estate was not devisable that there is where the question is whether a lapsed devise falls into the residue or goes to the heir at law.[43]

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[38] 4 Johns, Ch. (N. Y.) 388, 402.

[39] 4 Kent. Com. * 387, 14th ed.; Dougherty v. Dougherty, 2 Strob. Eq. (S. C.) 63, 66, accord.

[40] Hodgson v. Bective, 1 Hem. & M. 376, per Wood, V. C., p. 397: "The rule which gives the intermediate rents to the heir is the artificial result of our peculiar doctrine in this country in favor of the heir's position."

[41] Hodgson v. Bective, 1 Hem. & M. 376, per Wood, V. C., at p. 396; 10 H. L. C. 656, per Lord Cranworth, at p. 669.

[42] Hodgson v. Bective, 1 Hem. & M. 376, per Wood, V. C., at p. 396.

[43] In the following cases it was held that a lapsed devise of real estate went to the residuary devisee and not to the heir at law as a result of the fact that after acquired

The unsatisfactory character of the rule that the heir at law was entitled to the intermediate income of a residue of realty alone and the weakness of the reasons upon which that rule is based, have been pointed out by eminent judges.[44]

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real estate might be devised in the same way as after acquired personal property. Molineaux v. Raynolds, 55 N. J. Eq. 187; Thayer v. Wellington, 9 Allen (Mass.) 283, 295; Reeves v. Reeves, 5 Lea (Tenn.) 653; Cruikshank v. Home for the Friendless, 113 N. Y. 337, 354. **Contra**, Massey's Appeal, 88 Pa. 470; Rizer v. Perry, 58 Md. 112, 134.

[44] In Gibson v. Montfort, 1 Ves. Sr. 485, 490, Lord Hardwicke said: "It is pretty hard to say, that in any case where one devises all the rest and residue of his real estate, the heir should be enabled to claim anything out of it; for how can he claim or take these intermediate profits? He must claim [them] as part of the real estate undisposed [of] and not by any particular trust." This passage Chancellor Walworth quotes with approval in Rogers v. Ross, 4 Johns, Ch. (N. Y.) 488, 500. In Ackers v. Phipps, 3 Cl. & Fin. 665, 691, Lord Brougham, referring to the same passage from Lord Hardwicke, says: "It does seem difficult to understand a residuary devise, even when confined to real estate, in any other than this general and absolute sense. For what can it mean, but to give away from the heir whatever had not before been given away from him?" Again, at p. 699, he says, after approving the rule with respect to a mixed residue of real and personal property: "But I am also of the opinion that the gift of a real residue, without blending it with a personal residue, would of itself, have the same effect upon another ground, namely the meaning of 'residue'."